## INDEX.


| | PAGE |
|---|---|
| Petition for a Writ of Certiorari | 1 |
| Questions Presented | 4 |
| Jurisdiction | 5 |
| Opinions Below | 6 |
| Reasons for Granting the Writ | 6 |
| Statutes and Regulations Involved | 8 |
| Brief in Support of Petition for Certiorari | 11 |
| Jurisdiction | 11 |
| Statement | 11 |
| Information | 12 |
| Questions | 13 |
| Pertinent Statutes and Orders | 14 |
| POINT I. Regulations making it a crime to sell houses above a price stated in a priorities application, which were enacted after the builder completed the houses, were inapplicable to him | 14 |
| POINT II. The regulation requiring a builder to sell a housing unit to the public at large at a price as promised by him was an arbitrary assumption of legislative power and void and did not come within the penal provisions of the Second War Powers Act | 18 |
| Implied Power | 23 |
| POINT III. The information fails to comply with the Rules of Criminal Procedure in failing to state essential facts purporting to charge a crime | 31 |
| Conclusion | 35 |
| Appendix A. Pertinent Provisions of Second War Powers Act, 1942 | 37 |

PAGE

Appendix B. Preference Rating Order P-55 in effect before February 10, 1943, and before houses were completed . . . . . 38

Appendix C. First of a Series of Preference Rating Orders P-55 in effect after February 10, 1943.... 48

Appendix D. Abstract of Pertinent Orders ..... 49

Appendix E. Opinion of Circuit Court of Appeals.. 56

TABLE OF CASES CITED:

*Armour Packing Co.* v. *United States,* 209 U. S. 56.. 34

*Block* v. *Hirsch,* 256 U. S. 135 ..... 24
*Bowles* v. *Willingham,* 321 U. S. 503, 64 Sup. Ct. 641 28

*Calder* v. *Bull,* 3 Dall. 386 .....6, 15
*Calhoun* v. *Massie,* 253 U. S. 170, 40 S. Ct. 474 ..... 16
*Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599 ..... 25

*Davis Warehouses* v. *Bowles,* 321 U. S. 144 ..... 27

*Endo, Mitsuye, Ex Parte,* 323 U. S. 283 ..... 30

*Gemsco Inc.* v. *Walling,* 324 U. S. 244 .....25, 26

*Harris* v. *United States,* 104 F. (2d) 41 .....33, 34
*Home Building & Loan Association* v. *Blaisdel,* 290 U. S. 398, 54 S. Ct. 231 .....16, 28

*Jarl* v. *United States,* 19 Fed. (2d) 891 ..... 35

*Kappel* v. *Tiffin Savings Bank,* 197 U. S. 356 ..... 28

*Lynch* v. *United States,* 292 U. S. 571, 54 S. Ct. 840.. 16

*Manhattan Co.* v. *Commissioner,* 297 U. S. 129 ..... 25
*Morrisdale Coal Co.* v. *U. S.,* 259 U. S. 188 ..... 24

*Panama Refining Co.* v. *Ryan,* 293 U. S. 388 ..... 24

PAGE

*Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 24
*Steuart* v. *Bowles*, 322 U. S. 398, 64 Sup. Ct. 1097, 21, 26, 27, 29

*Tiffany* v. *National Bank*, 18 Wall. 409 ..... 28

*United States* v. *Cook*, 17 Wall. 168 ..... 33
*United States* v. *Eureka Investment Company*, United States District Court for the District of Arizona, Decree Aug. 17, 1945 (not officially reported).... 29
*United States* v. *George*, 228 U. S. 14 ..... 28
*United States* v. *Molnar*, United States District Court for the Northern District of Ohio, Eastern Division, Decree May 11, 1945 (not officially reported) 29
*United States* v. *Realty Company*, 163 U. S. 427, 16 S. Ct. 1120 ..... 16

*Wallace* v. *Cutten*, 298 U. S. 229 ..... 28

*Yakus* v. *United States*, 321 U. S. 414 .....27, 28

OTHER AUTHORITIES CITED:

Act of June 27, 1934, Public Law 479—73rd Congress, National Housing Act, as amended ..... 52

Congressional Record, page 7438 (Senator O'Mahoney) . . ..... 22
"Constitution of the United States of America", Sixty-eighth Congress, First Session, Senate Document No. 154, page 261 ..... 15

Emergency Price Control Act of 1942, U. S. Code, Title 50:
Sec. 205(f)(2) ..... 21
App. Sec. 901 *et seq.* .....17, 20, 22, 23, 27, 30, 31
App. Sec. 925, Subdivision f(2) ..... 21
Executive Order 9070 of February 24, 1942, 7 F. R. 1529 . . ..... 52

PAGE

Extension of Emergency Price Control Act, Hearings before the Committee on Banking and Currency, House of Representatives on H. R. 4376, 78th Cong. 2d Sess. (1944), 482, 717-719 ..... 21

First War Powers Act, 1941, Title 1, Act of Congress December 21, 1941 ..... 52

General Preference Order P-55-b, issued March 27, 1943, 8 F. R. 3828, amended April 9, 1943, 8 F. R. 4705, and August 23, 1943, 8 F. R. 11664 ..... 51

General Order No. 21-26, effective April 1, 1944 (not published in Federal Register) ..... 53

Judicial Code, as amended by the Act of February 13, 1925, Section 240(a) (28 U. S. C. A. 347a) .....5, 11

"Lever Act", 40 Stat. 284 ..... 23

Limited Preference Order P-55-c, issued February 12, 1944, effective March 1, 1944, 9 F. R. 1696, amended April 1, 1944, 9 F. R. 3564, and February 5, 1945, 10 F. R. 1483 .....51, 52

National Housing Administration General Orders Nos. 60-2 and 60-3 ..... 2

National Housing Administration General Orders:

No. 60-1, effective November 27, 1942; reissued with revisions as General Order No. 60-A, effective April 2, 1943, and General Order No. 61-B, effective May 1, 1943 (not published in Federal Register) ..... 53

No. 60-2, effective February 10, 1943 (8 F. R. 1829, February 11, 1943); reissued with revisions as General Order No. 60-2A, effective July 14, 1943 (9 F. R. 3065, March 22, 1944), General Order No. 60-2B, effective November 17, 1943 (9 F. R. 245, January 7, 1944), and Regulation No. 60-2C, effective January 27, 1944 (9 F. R. 2816, March 15, 1944) .....53, 54, 55

PAGE

No. 60-3, effective February 10, 1943 (8 F. R. 1830, February 11, 1943); reissued with revisions as General Order No. 60-3A, effective July 14, 1943 (8 F. R. 12079, September 2, 1943), General Order No. 60-3B, effective August 25, 1943 (8 F. R. 12080, September 2, 1943), and General Order No. 60-3C, effective November 12, 1943 (9 F. R. 247, January 7, 1944) .....54, 55

National Housing Agency Amendments:
April 1, 1944 by Program Vice Chairman, 9 F. R. 3547 ..... 52
May 24, 1944 by Program Vice Chairman, 9 F. R. 5595 ..... 52
December 11, 1944 by Program Vice Chairman, 9 F. R. 14487 ..... 53

National Housing Agency General Order 60-2, effective February 10, 1943, 8 F. R. 1829 .....3, 4, 32

National Housing Agency General Order 60-3, effective February 10, 1943, 8 F. R. 1830 .....3, 4, 32

Preference Order P-55, effective September 22, 1941, 6 F. R. 4842, amended March 2, 1942, 7 F. R. 1636, April 20, 1942, 7 F. R. 2940.....2, 3, 14, 15, 38, 55

Preference Rating Order P-55, amended February 13, 1943, 8 F. R. 1951 .....3, 15, 32, 48, 50, 51, 55

Preference Order P-55, issued February 12, 1944, effective March 1, 1944, 9 F. R. 1696, amended April 1, 1944, 9 F. R. 3565, and February 5, 1945, 10 F. R. 1483 .....4, 55

Preference Rating Order P-55a; issued February 20, 1943, 8 F. R. 2260 .....50, 51

Rent Regulations for Housing of the Office of Price Administration, Section 4 (f) (8 F. R. 13914)... 30

PAGE

Rules of Criminal Procedure:
Rule 2 ..... 31
Rule 7 ..... 5, 8, 31, 32

Second War Powers Act, Sec. 2(a)(2) of Section 633, Title 50, War Appendix, U. S. C., 2, 4, 7, 12, 16, 18, 20, 21, 22, 23, 25, 27, 28, 30, 31, 37, 38

Stabilization Act of 1942, U. S. Code, Title 50, App. Sec. 961 *et seq.* ..... 20

"The Federalist", Alexander Hamilton, #84, National Home Library Foundation, page 557 ..... 15, 16

United States Constitution:
Fifth Amendment ..... 4, 16, 17, 31
Sixth Amendment ..... 5
Article I, Section 1 ..... 23
Article I, Section 9, Clause 3 ..... 4, 17
Article I, Section 9, Clause 18 ..... 23

United States Government Manual—1945 First Edition issued by Division of Public Inquiries, Office of War Information ..... 18, 19, 20

Veterans' Emergency Housing Act of 1946, May 22, 1946, Chap. 268, Public Law 388, U. S. Code, Tit. 50, App. Sec. 1821 *et seq.* ..... 23

War Housing Insurance Act, Title 12, Section 1738.. 29

War Production Board Conservative Order L-41, effective April 9, 1942, 7 F. R. 2730 ..... 49, 52, 55

War Production Board Directive 24, issued June 18, 1943, 8 F. R. 8529 ..... 52

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. .**

---

ELADE REALTY CORPORATION,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Elade Realty Corporation, respectfully represents to the Court:

First: That on the 12th day of November, 1946, the Circuit Court of Appeals, Second Circuit, unanimously affirmed a judgment of conviction and sentence entered upon a plea of guilty entered in the District Court of the United States for the Eastern District of New York before Honorable Robert A. Inch, United States District Judge (fol. 74).

Second: The information filed on October 26, 1945, contained twenty-eight counts, charging that petitioner's officer and petitioner, which was in the business of building, leasing and selling dwellings or housing units, unlawfully sold housing units to various purchasers for prices in excess of the sum stated

in petitioner's application for material priorities pursuant to War Production Board Preference Order P-55-c and National Housing Administration General Orders Nos. 60-2 and 60-3, and in violation of the Second War Powers Act, 1942, as amended. The five counts embraced by the judgment of conviction—also the first count—are reproduced in the record (fols. 16 to 33).

Third: On November 7, 1945, both defendants named in the information moved to dismiss the information as not stating facts sufficient to charge any crime, specifying the grounds therefor (fols. 34 to 42). On February 21, 1946, Honorable Harold M. Kennedy, District Judge, wrote an opinion denying the motion (fols. 43 to 69).

Fourth: On April 8, 1946, petitioner pleaded guilty to the five counts of the information, followed by a motion in arrest of judgment, which was denied (fol. 12), and on April 18, 1946, petitioner was fined $3500. per count or a total of $17,500., followed by motion made in arrest of judgment which was also denied. All other counts as against petitioner and all counts as against petitioner's officer were dismissed on motion of the Government (fol. 13).

Fifth: Petitioner had erected houses aided by the use of some priorities procured under the Second War Powers Act, Sec. 2(a)(2) of Section 633, Title 50, War Appendix, U. S. C. (Appendix A annexed). These priorities were procured and the houses completed by February 10, 1943 (see Opinion Circuit Court, R. 51). Prior to February 10, 1943, the only regulation in existence binding petitioner was WPB Preference Rating Order P-55, effective September

22, 1941, 6 F. R. 4842, amended March 2, 1942, 7 F. R. 1636, further amended April 20, 1942, 7 F. R. 2940 (Appendix B annexed). That regulation (Appendix B) did not require petitioner to comply with any promise in any "application" made by petitioner to the War Production Board for priorities. Only after February 10, 1943, when the housing units were already completed, did any regulation come into existence requiring an owner to comply with any promises made in an application, a breach of which would subject such owner to criminal sanctions. Preference Rating Order P-55, amended February 13, 1943, 8 F. R. 1951 (Appendix C annexed). The latter order provides, however,

> "(1) Effect On Outstanding Orders. This order shall not affect serially numbered P-55 orders issued prior to February 12, 1943."

National Housing Agency General Order 60-2, effective February 10, 1943, 8 F. R. 1829, and National Housing Agency General Order 60-3, effective February 10, 1943, 8 F. R. 1830, are of similar import but too extensive to print here.

The information charges briefly that petitioner sold housing units to five different persons, between April 16, 1945 and August 24, 1945, for amounts in excess of $4990.00 "even though the construction of such unit had been made possible by priorities assistance which was granted upon the condition and agreement that such unit would be sold at a price not in excess of $4990.00." The information does not make any reference to any "application", except as inferred from the phrase above quoted. Nor does the information state the terms of the application for priorities, the time of its filing with the War Production

Board, the time the priorities were granted, the time of the completion of the housing unit and the status of the persons to whom the units were sold. All of the regulations and orders recited in the information were promulgated after the housing units were completed. (Preference Order P-55-c, issued February 12, 1944, effective March 1, 1944, 9 F. R. 1696, amended April 1, 1944, 9 F. R. 3565, and February 5, 1945, 10 F. R. 1483.) (National Housing Agency General Orders 60-2 and 60-3 effective February 10, 1943.)

## Questions Presented.

The following questions, which were considered by the Circuit Court of Appeals upon petitioner's challenge to the legal sufficiency of the Information, are presented for review:

1. Whether a builder who erected and completed houses with the aid of priorities obtained under a War Production Board regulation which did not make it a crime to sell houses above a price stated in the builder's application, was subject to new regulations enacted after the completion of the houses, which made it a crime thereafter to sell the houses above the price stated in the application, or whether the Fifth Amendment to the Constitution barring deprivation of "liberty, or property, without due process of law" and Section 9, Clause 3, Article I of the Constitution prohibiting the passage of an "ex post facto law" render the latter regulation inapplicable to such builder.

2. Whether the Second War Powers Act, expressly or by implication empowered the President or those under his jurisdiction to promulgate a valid order

making it a crime for a builder to breach his agreement or condition for the grant of material priority, that housing units erected with the aid of such material would not be sold in excess of a price stated in the application for priorities—the regulation in the instant case having reference to a sale to the public at large and not to a war worker.

3. Whether under the Sixth Amendment to the Constitution requiring the accused "to be informed of the nature and cause of the accusation" and the new Rules of Criminal Procedure requiring "a plain, concise and definite written statement of the essential facts constituting the offense charged" and requiring further a statement of "the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated" (Rule 7(c)) is legally sufficient when it fails to incorporate the date and terms of an "application" referred to in the regulations or plead the legal effect in words or substance of such "application"; further, whether under the new Rules of Criminal Procedure defendant had the right under Rules 7(e) and 7(f) thereof to compel the Government to serve an Amended Information containing essential facts making up the alleged crime as appears to be the ruling of the Circuit Court of Appeals at the end of its opinion (R. 52).

Arguments upon the questions are offered in the accompanying brief.

## Jurisdiction.

Jurisdiction is invoked under Section 240(a), Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a).

## Opinions Below.

The Circuit Court of Appeals rendered an opinion which appears at the end of the record and is also annexed hereto as Appendix E. The District Court also rendered an opinion which appears in the record (fols. 43 to 69).

## Reasons For Granting the Writ.

1. An important question of constitutional law involving both the "due process" and the "ex post facto" clauses is presented. A builder makes an application to the War Production Board for priorities to erect housing in connection with National Defense. He states in his application that he will not sell the houses above a certain price. The regulation under which the builder makes the application does not make it a crime to sell the houses above the prices stated. Nor does any other law make it a crime. He intends in good faith to sell at the price stated, but rising costs compel an adjustment of price. After the completion of the houses new regulations are enacted by the War Production Board and by the National Housing Agency. These regulations require compliance with the promises contained in the original application and makes it a crime to breach the promise. The Circuit Court of Appeals considered this proposition "a more difficult question" (R. 50) than Question (2) presented supra. Ever since—

*Calder* v. *Bull,* 3 Dall. 386;

the test on "ex post facto" has been the time of the commission of the crime. The cases have usually dealt with a specific statute. Here for the first time

so far as counsel can discover is a case involving an administrative regulation which puts the builder in a more serious position because of a penalty than he was before he changed his economic position by erecting the houses. The crucial question intrudes as to whether the sovereign can be estopped under such circumstances from imposing criminal penalty through an administrative regulation. It is further a crucial question whether the builder has been denied due process with respect to his property by the threat of a criminal violation and consequent punishment if he sells his houses above the originally stated price; say, to avoid loss due to increase in cost of construction from the time the application was filed and the houses completed.

2. An important question of arbitrary assumption of legislative power by the Executive Department in the promulgation of a regulation is presented for original determination. Petitioner, having sold the housing units to the public at large (it cannot be assumed to a limited class, such as so-called war workers under the information as pleaded) but at a price in excess of the amount specified in its "application", is convicted of a crime, not under any price fixing statute but under the Second War Powers Act, a priorities allocation or rationing statute. In determining the question, the reasonable relationship between the object of the Second War Powers Act in national defense and the means of accomplishment by a restriction on sales prices of housing units will have to be considered and resolved.

3. With reference to the matter of proper pleading in an information raised by question No. 3

supra, the Circuit Court stated at the end of its opinion:

> "The company also raises the added point that the allegations in the information were too vague to be valid; but a mere glance at the 'forms' permitted by the Criminal Rules is answer enough. Moreover, this being an information, it could have been amended at any time, had the company felt any genuine need of further enlightenment. Rules 7(e) and 7(f)."

The significance of the "Forms" is negatived by the unusual situation of an "application" being the foundation stone of any criminal accusation and such application is not set out, as to time, place, circumstance and terms, in the information nor is it a matter of public record like a statute, rule, or regulation. Furthermore, Form 3, Indictment for Mail Fraud, suggests that much more should have been pleaded in the situation at bar.

The suggestion in the opinion that the defendant could have compelled the Government to serve an amended information is not borne out by the Rules 7(e) and 7(f).

A determination of what constitutes a sufficient information in the circumstances here and an interpretation of Rules 7(e) and 7(f) in the face of the Circuit Court ruling is very important in the administration of criminal justice.

## Statutes and Regulations Involved.

The statutes and regulations involved are set forth in Appendices A, B, C and D hereto annexed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of said Court herein, being the case and entitled "*United States of America, Appellee,* v. *Elade Realty Corporation, Appellant,* case number 69, October Term 1946," decided November 12, 1946, and that judgment of said Court be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated: December 10, 1946.

ELADE REALTY CORPORATION,
By: HANNAH LEVINE,
Secretary.
LOUIS L. TETELMAN,
Attorney for Petitioner.

State of New York,
County of New York,
City of New York—ss.:

HANNAH LEVINE, being duly sworn, says:

I am the Secretary of the petitioner herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

HANNAH LEVINE.

Sworn to before me this
10th day of December, 1946.

LILLIAN KEISLER,
Commissioner of Deeds.
N. Y. Co. Clks. No. 77, Reg. No. 7-K-37.
Kings Co. Clks. No. 26, Reg. No. 7-K-30.
Bronx Co. Clks. No. 12, Reg. No. 7-K-21.
Commission Expires December 27, 1947.

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. .**

---

ELADE REALTY CORPORATION,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a).

### Statement.

On November 12, 1946, the Circuit Court of Appeals unanimously affirmed a judgment of conviction and sentence entered upon a plea of guilty, which had been entered in the District Court of the United States for the Eastern District of New York before Hon. Robert A. Inch, United State District Judge (fol. 74), on April 18, 1946 (fol. 115), the plea of guilty having been to five of twenty-eight counts in an information (fol. 16). Prior

to the plea and on November 7, 1945, petitioner moved to dismiss the information (fol. 34), which was denied on March 11, 1946 (fol. 70), with an opinion by Kennedy, *D. J.* (fol. 43). Following the plea of guilty and the sentence to pay $3,500 per count, or a total of $17,500, petitioner made motion for arrest of judgment (fol. 74) which was denied (fol. 112). Petitioner thereupon appealed to the United States Circuit Court of Appeals (fol. 121).

The legal sufficiency of the information is questioned on three grounds in the petition.

Petitioner was convicted of alleged violations of the Second War Powers Act of 1942, as amended, of a War Production Preference Order and National Housing Administration General Orders, in that it sold above price, housing units which were constructed through priorities assistance upon condition and agreement that the units would not be sold in excess of a fixed price of $4,990.

In considering the information the Circuit Court of Appeals assumed the fact that the application for priorities was filed and the housing units were completed before February 10, 1943, due to the absence in the information of any statement to such effect and the acquiescence of the Government in the correctness of such fact (fol. 52).

No question of diversion of priority materials nor of a denial of occupancy to so-called war workers by petitioner, is involved.

The Circuit Court of Appeals wrote an opinion (R. 48) (also annexed hereto as Exhibit E).

## Information.

Count "First" of the information (fol. 16) which is similar to the other counts except as to the name of the respective purchasers of the housing units and the prices paid, reads as follows:

"1. Elade Realty Corporation, a Corporation organized under the laws of the State of New York, with its

principal office and place of business at 160-16 Jamaica Avenue, Borough of Queens, City, State and Eastern District of New York, and ISRAEL M. FLAPAN, President of said Corporation, are hereby made the defendants herein. At all times hereinafter mentioned the defendants were engaged in the business of building, leasing and selling dwellings or housing units.

2. On or about March 3, 1945 in Farmingdale, Town of Oyster Bay, County of Nassau, State and Eastern District of New York, and within the jurisdiction of this court, defendants wilfully and unlawfully sold to Leonard H. Buettner and Lilian R. Buettner for $5,432.14, the housing unit located at 17 Sullivan Road, Farmingdale, Town of Oyster Bay, County of Nassau, State of New York, even though the construction of such unit had been made possible by priorities assistance which was granted upon the condition and agreement that such unit would be sold at a price not in excess of $4990.00, such action being in wilful violation of War Production Board Preference Order P-55-C and NHA General Orders Nos. 60-2 and 60-3 and contrary to the form of the statute in such case made and provided, Second War Powers Act, 1942 (March 27, 1942, Public Law 507, Ch. 199, 77th Cong. 2nd Sess.) as amended December 20, 1944 (Public Law 509, Ch. 614, 78th Cong. 2nd Sess.) amending 'An Act to Expedite National Defense, and for Other Purposes' (June 28, 1940, 54 Stat. 676), as amended May 31, 1941 (55 Stat. 236) and against the peace and dignity of the United States of America."

## Questions.

The questions presented are set forth in the petition for the writ of certiorari and covered by the points in this brief.

## Pertinent Statutes and Orders.

The pertinent statutes and orders are described in Appendices A, B, C and D hereof.

Particular attention is directed to so much of Preference Rating Order P-55 as amended, as was effective before February 10, 1943. The regulation is set forth in full in Appendix B. That regulation does not contain any compliance clause with respect to the sale of the housing units.

## POINT I.

(Supplementing Question 1 and Reason 1 for granting of writ, stated in the petition.)

**Regulations making it a crime to sell houses above a price stated in a priorities application, which were enacted after the builder completed the houses, were inapplicable to him.**

As of February 10, 1943, the builder had procured his priorities and completed his buildings (R. 51). Prior to that date the Priorities Regulation P-55 did not require compliance with a promise in the application to sell the houses within a price stated in the application (Appendix B).

The regulation (Appendix B) precluded diversion of materials, misrepresentations to the Government, and the like, violation of which would constitute a crime.

The builder submitted himself to the jurisdiction of the War Production Board on the basis of that regulation. At most, his promise with respect to the sale was a contractual obligation. Increased costs ruinous to him compelled the builder to increase his price (fol. 88). It was a choice between breaching his contractual obligation and economic ruin (fol. 92). But the regulation did not make the choice of crime.

The builder had aided National Defense by completing the housing units for occupancy (not necessarily for purchase) by war workers. With the completion of the buildings jurisdiction over the builder under the regulation P-55 in effect before February 10, 1943, stood. The creation of a new regulation purporting to impose a substantive and criminal liability, could not fall upon the builder, who had completed his job. It did not affect the old regulation (Appendix C).

Although the act of sale might be deemed the ultimate overt act within the rule of "*ex post facto*", yet here is a state of facts constituting, as it were, one transaction, which, it is submitted, the Government should be estopped to ignore.

The rule with relation to *ex post facto* is stated in the volume entitled Constitution of the United States of America, Sixty-Eighth Congress, First Session, Senate Document No. 154, page 261.

> "Every law that makes an act done before the passage of the law criminal, which was innocent when done, or that aggravates a crime or makes it greater than it was when committed, or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, or that alters the rules of evidence, permitting less or different evidence to convict a person of an offense committed prior to its passage, is an *ex post facto* law and within the prohibition of this clause."
>
> *Calder* v. *Bull*, 3 Dall. 386.

Alexander Hamilton in The Federalist, #84, National Home Library Foundation, page 557, said:

> "The establishment of, * * * the prohibition of *ex post facto* laws, * * * are perhaps greater securities to liberty and republicanism than any it [Constitution] contains. The creation of crimes after the com-

> mission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."

It is submitted that the application of the test of *ex post facto* should not be restricted to its narrowest terms by confining it only to the last act in a series of acts integrated in and arising out of a regulatory device created by the Second War Powers Act.

The Fifth Amendment also shields the builder.

It would seem that there was an obligation upon the Government, moral, equitable or honorary in nature, which barred it from imposing a potential crime upon a builder after he completed his work.

> *United States* v. *Realty Company*, 163 U. S. 427, 16 S. Ct. 1120;
> *Lynch* v. *United States*, 292 U. S. 571, 54 S. Ct. 840.

The basic rule of law in force at the time and place of the making of the contract enters into and becomes an integral part of a contract, here, the arrangement between the builder and the Government being in the nature of a contract.

> *Home Building & Loan Association* v. *Blaisdel*, 290 U. S. 398, 54 S. Ct. 231.

In,

> *Calhoun* v. *Massie*, 253 U. S. 170, 40 S. Ct. 474,

a Federal statute which appropriated funds on war claims, made it a misdemeanor for an attorney to collect a fee of more than 20% of the recovery. The attorney had had a prior written arrangement to receive 50% of the recovery as compensation for his services. The court

held, four Justices dissenting, that since Congress had made the appropriation, it had the power, simultaneously with the making of the award and as a condition precedent, to limit the amount to be paid to an attorney. It would follow from a study of that case, that had Congress first made the award and later enacted an additional statute making it a misdemeanor to collect more than a fixed percentage for legal services that said statute would have been unconstitutional under the *Due Process* clause.

So in the case at bar. The builder, acting upon the regulation, erects his houses. After having done so, he is now deterred from selling for a higher price for fear of criminal prosecution arising out of a violation of a regulation enacted later.

The Circuit Court of Appeals attempted to draw a parallel between the builder's promise in the application for priorities and the Emergency Price Control Act of 1942, stating that the builder's agreement to sell at a fixed price when no regulation was in existence with respect thereto, was the equivalent to and the substitute for the complete system of price control devised by the Emergency Price Control Act (R. 51). Respectfully, no legal basis supports such reasoning.

It is submitted that the Fifth Amendment to the Constitution barring deprivation of "liberty, or property without due process of law" and Clause 3, of Section 9 of Article I, prohibiting the passage of an "*ex post facto law*" protect the petitioner.

## POINT II.

(Supplementing Question 2 and Reason 2 for granting of writ, stated in the petition.)

**The regulation requiring a builder to sell a housing unit to the public at large at a price as promised by him was an arbitrary assumption of legislative power and void and did not come within the penal provisions of the Second War Powers Act.**

Each count of the information simply charges that defendant sold a housing unit to a person in excess of an agreed price.

As heretofore stated, the information is devoid of any allegation concerning the "application" referred to in all of the regulations. If it is to be inferred that an application was filed an inference upon such inference cannot be indulged that the application contained a promise that the sales would be made solely to war workers. Nor, should it be inferred that the builder sold the houses to war workers, when nothing appears to prompt such inference. In the absence of a description of the status of the buyer it must be assumed that the sale was made to the public at large.

Under the Second War Powers Act the President is given the power to "allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

He delegated that power to the War Production Board.

United States Government Manual—1945 First Edition issued by Division of Public Inquiries, Office of War Information, at page 110, states:

> "ACTIVITIES. * * * The major activities of the War Production Board revolve about its exercise of the

power to assign priorities to deliveries of material, to require acceptance and performance of contracts and orders deemed necessary for the defense of the United States, and to allocate materials and facilities whose supply is less than requirements. These powers, which are vested in the President by Title III of the Second War Powers Act (56 Stat. 177; 41 U. S. C. note prec. 1, 50 App. U. S. C. 633), were in turn delegated by the President to the Chairman of the War Production Board. They are used as the instruments through which the War Production Board exercises over-all control of the war production and procurement program and directs the flow of materials and critical components through the industrial system."

The National Housing Agency after February 10, 1943 assisted the War Production Board in conjunction with priorities issued on private war housing (Appendix D3).

The United States Government Manual (above) on page 129 states:

"For the duration of the war new construction is limited to war areas, and priority ratings as required by the War Production Board must be obtained whenever critical materials are necessary for private or public housing construction or for repair or rehabilitation work. Federal Housing Administration field offices accept, process, and approve applications for priorities and authority to begin construction on privately financed war housing and on utility lines or systems necessary thereto. In addition, FHA field offices issue allotments and preference ratings in connection with approved privately financed war housing projects. They likewise make compliance inspections of such projects to determine conformity of the construction with WPB and NHA regulations regarding the use of critical materials. There is no correlation whatever between these activities on behalf of the

War Production Board and the issuance of Federal Housing Administration commitments for mortgage insurance."

Second War Powers Act was strictly confined to "Priorities Powers" as Title III is entitled.

National defense was its object.

Nowhere in any directive of the President under the Second War Powers Act dealing with allocation of materials, is there any suggestion or pretense of "price-fixing".

In the effort to stabilize the economy and avoid wartime inflation, the Congress enacted the Price Control Act of 1942, U. S. Code, Tit. 50, App. Sec. 901 *et seq.*, to control the price of commodities and rents and the Stabilization Act of 1942, U. S. Code, Tit. 50, App. Sec. 961 *et seq.*, to control wages.

Congress drew clear lines of demarcation between materials control, price control and wage control. It sought cooperation however from the different agencies but within the limits of their own jurisdiction.

Witness the last sentence of the first section of the Emergency Price Control Act.

*U. S. Code*, Tit. 50, App. Sec. 901:

"* * * It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National War Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), *within the limits of their authority and jurisdiction*, to work toward a stabilization of prices, fair and equitable wages, and cost of production." (Italics ours.)

To the War Production Board no authority or jurisdiction was delegated by Congress to fix the price of the

housing units. Nor did the sales price of a housing unit concern it, so long as materials for defense were produced.

Congress did delegate the administrative function of price-fixing to another agency; the Office of Price Administration, under a very comprehensive scheme of legislation, with definite and precise standards set up.

In fact, Congress zealously confined the Second War Powers Act to priorities control and steered it away from price control.

Following the decision in *Steuart* v. *Bowles*, 322 U. S. 398, 64 Sup. Ct. 1097, on May 22, 1944, which sustained by implication the power of the Administrator of the Office of Price Administration to revoke a license, where the Second War Powers Act authorized the grant of a license to deal in rationed commodities, Congress amended the Emergency Price Control Act, Sec. 205 (f)(2), U. S. Code, Title 50, App. Sec. 925, Subdivision f(2), to provide in the last sentence thereof:

> "That no regulation, order, license, or requirement heretofore or hereafter issued or prescribed pursuant to section 2(a)(2) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act, 1942, may validly contain any requirement as to observance of any regulation, order, license, or requirement issued or prescribed pursuant to this Act or the Stabilization Act of October 2, 1942."

The above amendment resulted from a charge in Congress that the Administrator under delegation of authority from the President to ration under the Second War Powers Act, was using such authority to enforce price control. (Extension of Emergency Price Control Act, Hearings before the Committee on Banking and Currency, House of Representatives on H. R. 4376, 78th Cong. 2d Sess. (1944), 482, 717-719.)

When the Second War Powers Act originally was

enacted, June 28, 1940, price control had not been instituted. It came on January 30, 1942, with the enactment of the Emergency Price Control Act. An examination of all the reports of Senate and House Committees relative to the Second War Powers Act and amendments thereof reveals no intent to embrace price control in said act.

On June 21, 1946, the Senate was considering the extension of the Second War Powers Act of 1942. On page 7438 of the Congressional Record, Senator O'Mahoney stated the purpose of an offered amendment and the intent behind the enactment of the Second War Powers Act.

> "The purpose of it is to make certain that the powers granted by this act shall not be used for the purpose of price stabilization. They were not intended for such use, and I see no objection to the adoption of such an amendment."

The amendment reads:

> "Sec. 2 Title XV of such act, as amended, is amended by inserting at the end thereof a new section as follows:
>
> 'Sec. 1503. Nothing contained in this act or any other act (except the Emergency Price Control Act of 1942, as amended or the Stabilization Act of 1942, as amended), shall be construed to authorize the establishment by any officer or agency of the Government of maximum prices for any commodity or maximum rents for any housing accommodations.' "

It is therefore clear that Congress never intended to control prices through the medium of the Second War Powers Act and that if Congress purported to vest the President with the price-fixing power under the Act so as to make the violation of a price-fixing order a crime,

its purpose and intent are so vague that they clash with constitutional restrictions on the law making power.

**Implied Power.**

Article I, Section 1, of the Constitution of the United States, reads:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 9, Clause 18, thereof, reads:

> "To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof."

The Constitutional power of Congress to fix prices in the war emergency is not denied. But, where Congress has intended to fix a price it has said so. It did not leave it to implication. The Emergency Price Control Act of 1942 is proof of that.

But there is stronger proof.

Only recently the Veterans' Emergency Housing Act of 1946 became law. May 22, 1946, Chap. 268, Public Law 388, U. S. Code, Tit. 50, App. Sec. 1821 *et seq.* That act for the first time sets up a comprehensive system for the establishment of maximum sales prices for housing and imposes sanctions. It follows the pattern of the Emergency Price Control Act.

The Veterans' Emergency Housing Act of 1946 leaves unimpaired the Second War Powers Act as amended with respect to priorities and allocation of essential material.

The "Lever Act", 40 Stat. 284, was enacted with specific authorization to the President through a Fuel Administrator to fix prices of coal and regulate its distribution.

See:

*Morrisdale Coal Co.* v. *U. S.*, 259 U. S. 188.

Congress set up a comprehensive scheme of rent regulation in the District of Columbia during the last World War.

*Block* v. *Hirsch,* 256 U. S. 135.

In:

*Panama Refining Co.* v. *Ryan,* 293 U. S. 388,

Mr. Chief Justice Hughes, after quoting Art. I, Sec. 1 and Sec. 8, Cl. 18 of the Constitution, stated at page 421:

> "The Congress manifestly is not permitted to abdicate, or to transfer to others, the *essential* legislative functions with which it is thus vested."

Recognizing the right of executive to administer and regulate, he stated further:

> "But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitation of the authority to delegate, if our constitutional system is to be maintained."

and at page 433:

> "* * * When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation * * *."

See also:

*Schechter Poultry Corp.* v. *United States,* 295 U. S. 495.

In:

*Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599,

Mr. Justice Brandeis stated at page 610:

> "The limits of the power to issue regulations are well settled. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514. They may not extend a statute or modify its provisions. * * *"

In:

*Manhattan Co.* v. *Commissioner*, 297 U. S. 129,

it was said at page 134:

> "A regulation which * * * operates to create a rule out of harmony with the Statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320-322; *Miller* v. *United States*, 294 U. S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the Statute, but it must be reasonable. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514."

Restrictions on sales price to anyone had no relation to National Defense under the Second War Powers Act.

The restraint should have been no greater than what was reasonably necessary to accomplish the purpose intended. Stated another way—there should be a reasonable relation between the object to be attained and the means adopted to accomplish it.

In:

*Gemsco Inc.* v. *Walling*, 324 U. S. 244,

a regulation prohibiting homework to maintain wages was sustained. The Court recognized the rule above stated, saying at page 252:

> "Congress by stating expressly its primary ends does

> not deny resort to the means necessary to achieve them."

and at page 259:

> "When all of these facts are taken into account, the case is clearly not an instance of effort to achieve ends beyond or independent of the statutory objects. It rather exhibits but an exercise of the necessary means to accomplish those objects."

In the above cited *Gemsco* case the resort to homework frustrated the purpose intended—namely maintenance of wage standards.

In the case at bar the sale of a house to the public at any price did not frustrate the purpose of providing a house at a specified location with occupancy to war workers near defense plants. The end is beyond the statutory object.

And at the end of page 257:

> "His power, it is true, is not one of social or economic reform, except as that power relates to maintaining authorized minimum wages and the statutory hours of labor."

In

*Steuart Bro.* v. *Bowles,* 322 U. S. 398,

it is indicated that if the object of the regulation had been to penalize rather than to further ration control, a regulation framed with such intent would have been declared void.

The Court through Justice Douglas stated at page 404:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress

has placed behind a statute. *United States* v. *Two Hundred Barrels of Whiskey,* 95 U. S. 571, 24 L. Ed. 491; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 50 S. Ct. 412, 74 L. Ed. 1063; *Wallace* v. *Cutten, supra.* Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender."

The decision in the case recognized the proposition that the power to allocate materials included the power to issue a suspension order against a retailer and to withhold rationed material. The means and the end are related.

In:

*Davis Warehouses* v. *Bowles,* 321 U. S. 144,

the Court refused to read into the Emergency Price Control Act a Congressional intent to empower the Administrator to regulate prices or charges of a public utility.

So here, the existence of the Emergency Price Control Act precludes an implication that Congress intended to vest price fixing powers in the President through the Second War Powers Act.

*Yakus* v. *United States,* 321 U. S. 414,

was cited by the Circuit Court against the attack made here on a void and unconstitutional price fixing order. In that case a conviction was sustained by a divided court for a violation of an OPA regulation fixing the price of meat. There was a basic command in the Statute bolstered by a comprehensive scheme to "fix prices". Not so in the Second War Power Act.

Recognizing the command the Court, at page 424, said:

"The essentials of the legislative function are the determination of the legislative policy and its formula-

> tion and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which congress has established."

Nor, could the President under the guise of War Power reach beyond the policy expressed and the powers granted by the Second War Powers Act and fix the price of housing units.

In:

> *Bowles* v. *Willingham,* 321 U. S. 503, 64 Sup. Ct. 641,

Mr. Justice Douglas, acknowledged the validity of the ruling in:

> *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 Sup. Ct. 231,

quoting at page 521:

> "* * * even the war power does not remove constitutional limitations safeguarding essential liberties."

A criminal penalty arising for an excess sales price should not be imposed by implication.

See:

> *Tiffany* v. *National Bank,* 18 Wall. 409, 410;
> *Kappel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362;
> *Wallace* v. *Cutten,* 298 U. S. 229, 237.

Where the charge is of crime it must have clear legislative basis.

> *United States* v. *George,* 228 U. S. 14, 22.

We know of no law which makes one a criminal because he broke his promise. Other remedies may be resorted to for proper redress, but not the criminal law.

The promise of the builder made in the application could be specifically enforced by a decree in equity so as to protect the occupancy status of the war worker to aid the war effort.

> *United States* v. *Eureka Investment Company,* United States District Court for the District of Arizona, Decree Aug. 17, 1945 (not officially reported); and
> *United States* v. *Molnar,* United States District Court for the Northern District of Ohio, Eastern Division, Decree May 11, 1945 (not officially reported),

cited by the Government in the District Court are examples of such remedy.

The preference rating could have been withdrawn.

> *Steuart & Bro.* v. *Bowles, supra.*

Petitioner has not been accused of denying occupancy under the regulations to eligible war workers or that excessive rents were charged to prevent occupancy.

The Government was not concerned with who owned the property, only with who occupied it. This is clearly reflected by the legislative declaration of policy.

Title 12, Section 1738 of the War Housing Insurance Act provides:

> "The Administrator is further authorized to prescribe such procedures as in his judgment are necessary to secure to war workers *occupancy priority* with respect to property which has not been previously occupied and which are covered by mortgages under this section and Section 1743 of this title." (Italics supplied.)

Rent control, as a condition of priority grants, was effected, not through the Second War Powers Act, but through the Emergency Price Control Act and properly so.

Section 4(f) of the Rent Regulations for Housing of the Office of Price Administration (8 F. R. 13914) provides for the regulation of priority constructed housing.

Thus, it is clearly evident that the executive and administrative authorities fully realized that no jurisdiction vested in the War Production Board or other agencies under the Second War Powers Act to control rents for occupancy purposes. It therefore follows that if no jurisdiction vested in the War Production Board to control rents, none vested to control prices under the Second War Powers Act.

The Circuit Court in its opinion (R. 50) suggests that the object in the promulgation of the regulation was to assure "less drain upon the National resources" if the shelter were cheaper and limited "drain upon the total stock of available materials" if the houses were cheap.

It is submitted that the object of cheap shelter was served by giving occupancy to war workers, through a tenancy, which is not the issue here. Since the sale of the houses could freely be made to the public at large a cheap house or a more expensive house would have an extremely remote, if any, affect on the total stock of available materials.

In

*Ex Parte Mitsuye Endo*, 323 U. S. 283, at page 300,

it is stated:

> "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

In the light of the petitioner's contention here that the Second War Powers Act, on which the information is based, concerned itself solely with the allocation of essential materials for the defense of the country, as distinguished from price control and rent control under the Emergency Price Control Act, and wage control under the Stabilization Act, the War Production Board order fixing the price and making it a criminal violation to sell in excess thereof had no legal basis, and was void and unconstitutional on its face.

To prosecute an information based on such a palpably illegal order would deny the protection of due process within the meaning of the Fifth Amendment to the Constitution.

It is therefore submitted that on the grounds set forth in the notice of motion (fols. 35-41) the information should have been dismissed.

## POINT III.

(Supplementing Question 3 and Reason 3 for granting of writ of certiorari in the petition.)

**The information fails to comply with the Rules of Criminal Procedure in failing to state essential facts purporting to charge a crime.**

The Rules of Criminal Procedure before the District Courts of the United States, provide:

> "RULE 2. PURPOSE AND CONSTRUCTION. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."
>
> "RULE 7. THE INDICTMENT AND THE INFORMATION.
> * * *

"(c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. * * *"

"(e) AMENDMENT OF INFORMATION. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

"(f) BILL OF PARTICULARS. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

An "application" for priorities is the very basis of petitioner's conduct. It is referred to in all the pertinent sections of War Production Board Order P-55 enacted after February 10, 1943, and all General Orders of the Nationad Housing Administration enacted after February 10, 1943.

Neither the time nor the making of the application, its terms, its date of approval—all ultimate facts—all ingredients of the alleged crime—is stated. Nor is the status of the person, to whom the houses were sold, given.

A defendant is entitled to allegations of ultimate fact in the information which would guide him to applicable provisions in the orders in order to know the nature of the crime charged. There are numerous exceptions in the General Orders of the National Housing Agency. These exceptions are not stated in the information.

A defendant is entitled to know which exceptions under the regulations are inapplicable to him. As was said in:

*United States* v. *Cook*, 17 Wall. 168, at page 174:

> "* * * 'Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed. * * *"

The Circuit Court of Appeals has stated in its opinion (R. 52), that, "a mere glance at the 'forms' permitted by the Criminal Rules is answer enough" to the claim of vagueness. But if one turns to the rules and reads Form 3 with relation to an indictment for mail fraud, it is clearly indicated that essential facts were omitted from the information in the case at bar.

With regard to the failure to state the status of the person to whom the houses were sold, the Court is respectfully referred to:

*Harris* v. *United States*, 104 F. (2d) 41,

where a post office official was accused of making a false "statement of mailing", but the indictment did not show that the statement of mailing was a document which the defendant was under a duty as an official to keep. In differentiating between substance and form in the setting of 18 U. S. C. A., Sec. 556, the Court stated at page 45:

> "It is fundamental that all the necessary ingredients of the offense must be set out in the indictment, and

> the omission of any fact or circumstance necessary to constitute the offense will be fatal. *United States* v. *Cruikshank et al.*, 92 U. S. 542, 23 L. E. 588. Any omission of that nature cannot be supplied by 'intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital'. *United States* v. *Hess, supra*" (124 U. S. 483).

In:

*Armour Packing Co.* v. *United States*, 209 U. S. 56,

it is stated at page 83:

> "This Court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions. * * *"

The Circuit Court in its opinion (R. 52), stated:

> "Moreover, this being an information, it could have been amended at any time, had the company felt any genuine need of further enlightment. Rules 7(e) and 7(f)."

As we read the rule it was framed to avoid frustration of justice where the evidence was sufficient to constitute a crime, so that the information could be conformed to the proof. Nothing appears in the rule, nor do we know of any practice, whereby a defendant may make a motion compelling the Government to serve an amended information.

A demand for a bill of particulars would have served no useful purpose, because a bill of particulars cannot be used in conjunction with an information upon a motion to dismiss for legal insufficiency. Furthermore, a bill of

particulars is "no remedy for material and substantive omissions from the charge" "it cannot be used to cure an indictment fatally defective".

*Jarl* v. *United States*, 19 Fed. (2d) 891.

## CONCLUSION.

**For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental and basic questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.**

Respectfully submitted,

LOUIS L. TETELMAN,
*Attorney for Petitioner.*

New York, N. Y.,
December 10, 1946.

## APPENDIX A.

### Pertinent Provisions of Second War Powers Act, 1942.

The Second War Powers Act, U. S. Code, Tit. 50, App. Sec. 633, Sec. 2(a)(2) provides in part:

> "* * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Paragraph (6) thereof confers jurisdiction on the district courts of the United States to enforce both civil and criminal violations of Section 2(a)(2) above or any rule, regulation, or order issued thereunder.

Paragraph (8) provides:

> "The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

Paragraph (5) provides:

> "Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder,

whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Nowhere in the Second War Powers Act is there any provision authorizing the fixing of a ceiling price for anything, nor is there any provision in the Act authorizing any person aggrieved by any rule, regulation or order to challenge a purported price fixing regulation in advance of its violation.

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## APPENDIX B.

**Preference Rating Order P-55 in effect before February 10, 1943, and before houses were completed.**

PART 955—MATERIAL ENTERING INTO THE CONSTRUCTION OF DEFENSE PROJECTS

*Preference Rating Order No. P-55 Amended—Material Entering Into the Construction of Defense Housing Projects*

§ 955.4 *Preference rating order P-55.* For the purpose of facilitating the acquisition of Material for the construction of the Defense Housing Project hereinafter described, a preference rating is hereby assigned to deliveries to the above named Builder and to deliveries to his Subcontractors and Suppliers upon the following terms:

(a) *Definitions.* (1) "Builder" means the specific person to whom this Order is addressed above.

(2) "Defense housing project" means the housing project described in the Builder's Application on Form PD-105, No. ....., dated ....., comprising ..... units, as finally approved (hereinafter referred to as the "Applicant").

(3) "Subcontractor" means any person with whom the Builder has placed a contract pursuant to which the Subcontractor has agreed to furnish both labor on, and Defense Housing Material to be incorporated in, the Defense Housing Project.

(4) "Supplier" means any person (i) who supplies Defense Housing Material *which he has not in whole or in part manufactured, processed, assembled or the form of which he has not otherwise substantially changed,* and

(ii) with whom a contract or purchase order has been placed for delivery, to the Builder, to a Subcontractor or to another Supplier, of Defense Housing Material which will enter into the construction of the Defense Housing Project.

(5) "Defense housing material" means any material included in the Defense Housing Critical List, *and only such Material.* Copies of this List may be obtained from any local office of the Federal Housing Administration, from any priority field office of the Bureau of Field Operations, War Production Board, or from the Housing Branch, Division of Industry Operations, War Production Board, Washington, D. C.

(b) *Assignment of preference rating.* Preference Rating ..... is hereby assigned (1) to deliveries to

the Builder of those quantities and kinds of Defense Housing Material which may be specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder.

(2) to deliveries to a Subcontractor of Defense Housing Material which will ultimately be delivered by him to the Builder under the rating hereby assigned or will be physically incorporated into Defense Housing Material which will be so delivered or which will be used, within the limitation of paragraph (d) (2) hereof, to replace in such Subcontractor's inventory Defense Housing Material so delivered.

(3) to deliveries to a Supplier of Defense Housing Material, which will ultimately be delivered to the Builder under the rating hereby assigned, or which will be physically incorporated into Defense Housing Material to be so delivered, or which will be used, within the limitations of paragraph (d) (2) hereof, to replace in such Supplier's inventory Defense Housing Material so delivered.

(e) *Persons entitled to apply preference rating.* The preference rating hereby assigned may, within the limitations of paragraph (d) hereof, be applied by: (1) The Builder;

(2) Any Subcontractor or Supplier who supplies Defense Housing Material to the delivery of which a rating has been applied as provided in paragraph (e) hereof.

(d) *Restrictions on use of preference rating*—(1) *Restrictions on the builder:*

(i) The Builder may apply the preference rating hereby assigned only to those quantities and kinds of Defense Housing Material specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder. This Order will be cancelled immediately if the Builder is found to have applied the rating to deliveries in excess of his specific authorization.

(ii) The Builder may not apply said preference rating to obtain delivery of Defense Housing Material in greater quantities or on earlier dates than required to enable him to maintain his construction schedule on the Defense Housing Project.

(2) *Restrictions on subcontractor and supplier.* (i) No Subcontractor or Supplier may apply the preference rating hereby assigned to obtain Defense Housing Material in greater quantities or on earlier dates than required to enable him to make on schedule a delivery rated hereunder or, within the limitations of paragraph (d) (2) (ii) below, to replace in his inventory Defense Housing Material so delivered. He shall not be deemed to require such Defense Housing Material if he can make his rated delivery and still retain a practicable working minimum inventory thereof; and if in making such delivery he reduces his inventory below such minimum, he may apply the rating only to the extent necessary to restore his inventory to such minimum;

(ii) Any Subcontractor or Supplier entitled to apply the preference rating hereby assigned may defer

applications of such ratings to purchase or contracts to be placed by him for Defense Housing Material until he can place a purchase order or contract for the minimum quantity procurable on his customary terms: *Provided,* That he shall not defer the application of any rating for more than three months after he becomes entitled to apply it;

(iii) A Supplier may only apply the preference rating hereby assigned to deliveries of Defense Housing Material which he will resell without substantial change in form to fill a specific purchase order or contract rated hereunder or which he will use within the limitations of paragraph (d) (2) (ii) above to replace in his inventory Defense Housing Material so resold.

(e) *Application of preference rating.* (1) The Builder or any Subcontractor or Supplier in order to apply the preference rating hereby assigned to deliveries of Defense Housing Material to him must:

(i) Serve a copy of this Order upon each Subcontractor or Supplier with whom he has placed a contract or purchase order for Defense Housing Material to the delivery of which he elects to apply the preference rating. After he has furnished one such copy to a particular Subcontractor or Supplier, he need furnish no additional copies to that Subcontractor or Supplier to cover any subsequent deliveries of Defense Housing Material; and

(ii) Endorse on each purchase order or contract rated hereunder a statement in the following form manually signed by an official duly authorized for such purpose:

*Appendix B.*

Preference Rating ..... is applied hereto under Preference Rating Order No. P-55 Amended, Serial No.(s). ....., with the terms of which Order the undersigned Builder (Subcontractor, Supplier) is familiar.

.....
(Name of builder, subcontractor or supplier)

.....
(Duly authorized official)

Such endorsement shall constitute a representation to the War Production Board and the person with whom the purchase order or contract is placed that such purchase order or contract is duly rated in accordance herewith. Such person shall be entitled to rely on such representation, unless he knows or has reason to believe it to be false. Any such purchase order or contract shall be restricted to Defense Housing Material, the delivery of which is rated in accordance herewith.

(2) The Builder and each Subcontractor (but not a Supplier), must, in addition to the requirements set forth in paragraphs (e) (1) (i) and (e) (1) (ii) above, submit in triplicate to the same local office of the Federal Housing Administration, with which the Builder filed his Application, each purchase order or contract which is to be rated hereunder for the countersignature of an authorized agent of the Federal Housing Administrator. No purchase order or contract placed by the Builder or any Subcontractor can validly apply the rating hereby assigned without such countersignature.

(3) Any Subcontractor or Supplier, who has received two or more endorsed purchase orders or con-

tracts for Defense Housing Material bearing the same rating under this or any other Preference Rating Order or Orders No. P-55, Amended, may (within the limitations of paragraph (d) hereof) include in a single purchase order or contract any or all of the Defense Housing Material to which he is entitled to apply the rating assigned by such Order or Orders, but must specify in the endorsement on such single purchase order or contract all of the Serial Numbers contained in the purchase orders or contracts which have been so received by him.

(f) *Records.* In addition to the records required to be kept under Priorities Regulation No. 1, as amended from time to time, the Builder and each Subcontractor and Supplier placing or receiving any purchase order or contract rated hereunder, shall retain, for a period of two years, for inspection by representatives of the War Production Board, endorsed copies of all such purchase orders or contracts, whether accepted or rejected, segregated from all other purchase orders or contracts or filed in such a manner that they can be readily segregated for such inspection.

(g) *Communications to War Production Board.* All reports required to be filed hereunder, and all communications concerning this Order, shall, unless otherwise directed, be addressed to:

War Production Board
Washington, D. C.
Ref.: P-55

(h) *Violations.* Any Person who willfully violates any provisions of this Order or who by any act or

omission falsifies records to be kept or information to be furnished pursuant to this Order may be prohibited from receiving further delivery of any Material subject to allocation, and such further action may be taken as is deemed appropriate including a recommendation for prosecution under Section 35A of the Criminal Code (18 U.S.C. 80).

(i) *Revocation or amendment.* This Order may be revoked or amended by the Director of Industry Operations at any time as to the Builder, or any Subcontractor or Supplier.

(1) In the event of revocation, deliveries already rated pursuant to this Order shall be completed in accordance with said rating, unless the rating has been specifically revoked with respect thereto. No additional applications of the rating to any other deliveries shall thereafter be made by the Builder or any Subcontractor or Supplier affected by such revocation.

(2) Upon expiration of this Order, deliveries already rated pursuant thereto shall be completed in accordance with said rating. No additional applications of the rating to any other deliveries shall thereafter be made by the Builder but a Subcontractor or Supplier may continue to apply the rating to deliveries of Defense Housing Material required by him to fill purchase orders or contracts duly rated hereunder or, within the limitations of paragraph (d) (2) hereof, to replace in his inventory Defense Housing Material so delivered.

(j) *Applicability of Priorities Regulation No. 1.* This Order and all transactions affected thereby are

subject to the provisions of Priorities Regulation No. 1 (Part 944), as amended from time to time, except to the extent that any provisions hereof may be inconsistent therewith, in which case the provisions of this Order shall govern.

(k) *Effective date.* This Order shall take effect when countersigned by a District Manager, Bureau of Field Operations, War Production Board, and unless sooner revoked, shall expire on the.....day of .....

Issued this 2d day of March 1942.

J. S. KNOWLSON,
*Director of Industry Operations.*

This order is not valid unless countersigned by a District Manager, Bureau of Field Operations, War Production Board.

Countersigned by

.....
Name

.....
Effective Date

.....
Title

.....
Field Office

*Instructions regarding reproduction of orders.* This Order may be reproduced by any process, photographic, printing, mimeographing or otherwise: *Provided,* That (1) All copies must be identical with the

officially published Order as to size, wording, paragraphing and punctuation, and must be substantially the same as to color of paper;

(2) The name and address of the Builder to whom the Order is addressed, and the Serial Number of the Order must be included in all copies in the space provided therefor at the head of the Order;

(3) The name of J. S. Knowlson, Director of Industry Operations, must be included in all copies in type or print preceded by "(Signed)" in the space provided therefor at the end of the Order unless the entire Order is reproduced by photographic process. (P. D. Reg. 1, amended December 23, 1941, 6 F.R. 6680; W.P.B. Reg. 1, Jan. 26, 1942, 7 F.R. 561, E.O. 9024, Jan. 16, 1942, 7 F.R. 329; E.O. 9040, Jan. 24, 1942, 7 F.R. 527; sec. 2 (a), Pub. Law 671, 76th Cong. 3d Sess., as amended by Pub. Law 89, 77th Cong., 1st Sess.)

[F. R. Doc. 42-1802; Filed, March 2, 1942; 11:52 a. m.]

## APPENDIX C.

**First of a Series of Preference Rating Orders P-55 in effect after February 10, 1943.**

Preference Rating Order P-55, amended, February 13, 1945, 8 F. R. 1951:

"Sec. 1075.7 (f) LIABILITY OF OWNER. The owner and any other person who now holds or hereafter acquires any beneficial interest in the housing project or any part thereof, is hereby ordered to comply with all the representations, certifications and promises made by said owner in the Application, except where and to the extent such other person is relieved of such responsibility by regulation of the National Housing Agency.

"(i) VIOLATIONS. Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime and, upon conviction, may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of or from processing or using material under priority control, and may be deprived of priorities assistance by the Director General for Operations, and may be denied permission to begin construction under General Conservation Order L-41.

"(1) EFFECT ON OUTSTANDIG ORDERS. This order shall not affect serially numbered P-55 orders issued prior to February 12, 1943."

## APPENDIX D.

### Abstract of Pertinent Orders.

1.

WAR PRODUCTION BOARD ORDERS AND REGULATIONS

Conservation Order L-41 was originally issued and became effective April 9, 1942 (7 F.R. 2730). It has been amended on numerous occasions thereafter, but at all times provided that no new construction, as defined in the Order, should be begun or carried on without authorization from the War Production Board, subject to certain exceptions. In the case of housing, only $200 of new construction is permitted without authorization.

By said Conservation Order L-41, it is found, among other things, that war requirements of the United States have created a shortage of all materials required for war production and construction necessary thereto, for private account, and for export; that the War Production Board accordingly has stated as its policy that it is in the national interest that all construction which is not essential, directly or indirectly, to the successful prosecution of the war, and which involves the utilization of labor, material or construction plant urgently needed in the war effort, be deferred for the duration of the emergency; and that the Order is therefore necessary and appropriate in the public interest to conserve scarce materials by allocating them to essential uses and restricting their uses in non-essential construction.

Preference Rating Orders of the P-55 series were issued for the purpose of facilitating and governing construction of Private War Housing.

*Appendix D.*

Preference Rating Order P-55 was issued September 22, 1941 (6 F.R. 4842) and was amended on March 2, 1942 (7 F.R. 1636), April 20, 1942 (7 F.R. 2940) and February 12, 1943 (8 F.R. 1951). The regulation, before the amendment on February 12, 1943 (February 10, 1943 being a crucial date because of the builder's completion of the houses), did not include any compliance clause. As amended February 12, 1943, the following clause was added to the Order:

> "(f) *Liability of owner.* The owner and any other person who now holds or hereafter acquires any beneficial interest in the housing project or any part thereof, is hereby ordered to comply with all the representations, certifications and promises made by said owner in the Application, except where and to the extent such other person is relieved of such responsibility by regulation of the National Housing Agency."

Also

> "(l) Effect On Outstanding Orders. This order shall not affect serially numbered P-55 orders issued prior to February 12, 1943."

Preference Rating Order P-55a, issued February 20, 1943 (8 F.R. 2260) provides:

> "(c) *Conditions applicable to owners of war housing.* No person to whom a Preference Rating Order P-55 has been assigned shall transfer or dispose of any dwelling unit to which such order relates, or accept payment of rental or sales price for any such unit except in the manner and for the amount set forth in the application form or

in the manner and for the amount approved pursuant to paragraph (a) hereof; nor shall any such person so transfer or dispose of any such unit to any person other than the persons specified in paragraph (b) hereof, except as authorized by regulations or orders of the National Housing Agency."

General Preference Order P-55-b was issued March 27, 1943 (8 F.R. 3828) and was amended on April 9, 1943 (8 F.R. 4705) and August 23, 1943 (8 F.R. 11664). It established a somewhat different system of control. The liability clause is contained in the original Order and all amendments thereto.

The system was again altered somewhat by Limited Preference Order P-55-c issued February 12, 1944, effective March 1, 1944 (9 F.R. 1696) and amended on April 1, 1944 (9 F.R. 3564) and February 5, 1945 (10 F.R. 1483). It provides for the granting of authorization for housing construction and the use of priorities assistance in acquiring material for such construction, and further provides that the applicant and any other person who holds or acquires any interest in the project must abide by all representations, certifications and promises made by him in the application. The liability clause is contained in the original Order as of February 12, 1943 and all amendments thereto.

*Appendix D.*

2.

## Delegation From War Production Board to National Housing Administration

Federal Housing Administration is an agency organized under the provisions of Act of June 27, 1934 (Public Law 479—73rd Congress, National Housing Act, as amended) and by Executive Order 9070 of February 24, 1942 (7 F.R. 1529) was consolidated into the National Housing Agency, an agency established under the provisions of Title 1 of the First War Powers Act, 1941 (Act of Congress December 21, 1941), and said Executive Order 9070.

War Production Board Directive 24, issued June 18, 1943, by the Executive Vice Chairman of the War Production Board (8 F.R. 8529) authorized the National Housing Agency to make allotments of materials and assign preference ratings to deliveries of material and products for the construction of war housing projects authorized by the War Production Board. By amendment of April 1, 1944 by the Program Vice Chairman (9 F.R. 3547) the National Housing Agency was authorized to approve applications under Limited Preference Order P-55-c for housing construction and to permit the use of allotment symbol "H" to obtain material; it also provided that such approval constituted War Production Board authorization under Conservation Order L-41. An amendment of May 24, 1944, issued by the Program Vice Chairman (9 F.R. 5595) authorized approval of construction by any Federal Agency under the jurisdiction of the National Housing Agency, as well as by National Housing Administration, and author-

ized issuance of approvals in the name of the War Production Board for the purchase of products and materials to be used in construction. An amendment of December 11, 1944 issued by the Program Vice Chairman (9 F.R. 14487) restricted the rent or sale price which might be accepted for dwelling units.

The National Housing Administration delegated these powers to Federal Housing Administration by General Order No. 21-26 effective April 1, 1944 (not published in Federal Register).

3.

NATIONAL HOUSING ADMINISTRATION ORDERS

*National Housing Administration General Order No. 60-1,* effective November 27, 1942; reissued with revisions as General Order No. 60-1A, effective April 2, 1943, and General Order No. 60-1B, effective May 1, 1943. (These regulations were not published in the Federal Register and therefore do not possess the legal equivalents of statutes.)

*National Housing Administration General Order No. 60-2,* effective February 10, 1943 (8 F.R. 1829, February 11, 1943); reissued with revisions as General Order No. 60-2A, effective July 14, 1943 (9 F.R. 3065, March 22, 1944), General Order No. 60-2B, effective November 17, 1943 (9 F.R. 245, January 7, 1944), and Regulation No. 60-2C, effective January 27, 1944 (9 F.R. 2816, March 15, 1944).

*National Housing Administration General Order No. 60-2, Section 5, Subdivision .02,* provides:

"Private war housing begun prior to February

10, 1943, shall be rented, sold, or transferred only in accordance with the provisions of the application (or other instruments related thereto) for priority assistance, authority to begin construction ....."

*National Housing Administration General Order No. 60-2* was reissued, with revisions, as General Order No. 60-2C. The restrictive clause as to the sale of said housing units is contained in the original Order and all amendments thereunder.

*National Housing Administration General Order No. 60-3,* effective February 10, 1943 (8 F.R. 1830), February 11, 1943; reissued with revisions as General Order No. 60-3A, effective July 14, 1943 (8 F.R. 12079, September 2, 1943), General Order No. 60-3B, effective August 25, 1943 (8 F.R. 12080, September 2, 1943), and General Order No. 60-3C, effective November 12, 1943 (9 F.R. 247, January 7, 1944).

*National Housing Administration General Order No. 60-3, Section 3, Subdivision .03,* provides:

"All private war housing begun prior to February 10, 1943, which has not been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner except that for the duration of the national emergency declared by the President on September 8, 1939:

a. Rentals or sales prices (except for involuntary transfer and except to the extent approved prior to February 10, 1943 by the War Production Board, or subsequent to February 10,

1943 by the National Housing Agency) shall not exceed the respective maximum amounts permitted by the conditions of the application (or other instruments related thereto) for priority assistance ....."

Section 3 of National Housing Administration Order No. 60-3 provides that all private war housing begun prior to February 10, 1943 (defined as the date of submitting to Federal Housing Administration an application for priority assistance) may be sold at a price not in excess of "the respective maximum amounts permitted by the conditions of the application for priority assistance". It is further specifically stated that all such housing constructed with priority assistance obtained from the War Production Board by filing application on Form PD-105 may be disposed of "only as provided in such application".

Section 4 provides that the sale price for any housing accommodation may be increased "only when approved by the National Housing Administration" and the owner may petition for an increase in such price, the Regional Representative being authorized to grant such increase if the owner has incurred, or will incur, costs, over which he has no control, in excess of the costs originally estimated.

Conservation Order L-41 (7 F.R. 2730) and War Production Board Order No. P-55 series, and National Housing Administration Order No. 60-2C and 60-3C were revoked on October 11, 1945 to take effect October 15, 1945.

**APPENDIX E.**

## UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

No. 69—October Term, 1946.

(Argued October 10, 1946 Decided November 12, 1946.)

Docket No. 20334

---

UNITED STATES,

*Appellee,*

—v.—

ELADE REALTY CORPORATION,

*Appellant.*

---

Before:

L. HAND, SWAN and FRANK,

*Circuit Judges.*

---

Appeal from a judgment of the District Court for the Eastern District of New York, convicting the defendant of a violation of the Second War Powers Act.*

---

LOUIS L. TETELMAN, *for the appellant.*

MARIO PITTONI, *for the appellee.*

---

* §633(5), Title 50, Appendix, U. S. C.

*Appendix E.*

L. HAND, *Circuit Judge*:

The Elade Realty Company appeals from a judgment, convicting it under five out of twenty-eight counts of an information for violating that section of the Second War Powers Act,* which makes it an offence to perform "any act prohibited * * * by * * * any * * * regulation," passed in pursuance of the President's powers conferred by the Act. The company's position is that the counts to which it pleaded did not allege facts constituting a crime. Each count alleged that on a day certain—varying between April 16th and August 24th—in the year 1945, the company sold a house on "Sullivan Road, Farmingdale, Town of Oyster Bay, County of Nassau, State of New York," at a price greater than that at which it had agreed to sell the house "even though the construction" of the house "had been made possible by priorities assistance * * * granted upon the condition and agreement" that the house would not be sold for more than the agreed price. The question is whether the regulations, in force at the time when the sales were made, were valid, which forbad a builder, who had received a grant of "priority" in materials, to sell at a higher price than that to which he had limited himself in his application, or for more than the "fair market price," or in any event for more than $6000. The information did not allege when the company filed its applications for priority, when the "priorities" were granted, when the company began to use the materials so obtained, when it used the last of these in building, or what was the value of those

* §633(5), Title 50, Appendix, U. S. C.

used after February 10, 1943, a date which is important for reasons which will appear. All we know is that at the hearing upon sentence the company's president declared that the "construction job continued from March, 1942, to July, 1943." Until February 10, 1943, neither the National Housing Agency nor the War Production Board, had promulgated any regulation, setting any limit upon the price which a builder might charge for houses built with "priority" materials. On that day two regulations of the National Housing Agency went into effect, one of which enacted that "the total purchase price" of any building should be "a fair market price, or $6000, whichever is lower"**; and that houses "begun prior to February 10, 1943, shall be * * * sold * * * only in accordance with the provisions of the application."¶ The other regulation¶¶ set the same limit to the sale price,# and enacted that the "sales prices" of such houses "shall not exceed the respective maximum amounts permitted by the conditions of the application."† On February 12, 1943, a regulation of the War Production Board†† also went in effect, which enacted that "owners" were "hereby ordered to comply with all the representations, certifications and

---

** §702.1(d)(4). N. H. A. General Order 60-2; 8 Fed. Reg. pp. 1829, 1830.

¶ §702.4(b); N. H. A. General Order 60-2; 8 Fed. Reg. pp. 1829, 1830.

¶¶ N. H. A. General Order 60-3; 8 Fed. Reg. pp. 1830, 1831.

# §702.11(a)(2)(i).

† §702.11(c)(1).

†† Preference Rating Order P-55; 8 Fed. Reg. pp. 1951, 1952.

promises made by said owner in the Application."‡ The chief point argued is that the Second War Powers Act‡‡ did not authorize the provisions just quoted from these regulations.

The Act‡‡ gave power to the President to allocate any materials of which there was a shortage "for the defense of the United States * * * upon such conditions and to such extent as he shall deem necessary or appropriate * * * in the public interest and to promote the national defense." Although, as we have seen, the regulations allowed prospective builders, who needed "priority" materials, to set their own prices, they held them to what they set, and they imposed as a further limit upon any sale "the fair market price," and never more than $6000. It seems to us of no consequence whether this be called "price-fixing"; the only relevant question is whether the regulations were ancillary to the purpose of the Act. We hold that they were. Their primary object probably was to assure houses for those who were making munitions of war by directing such materials as were not needed for the actual manufacture of these, to the construction of cheap houses. Nobody can question that, so far as this was in fact the effect of the regulations, it implemented the Act, even under its narrowest interpretation: those who make weapons must have shelter, and the cheaper the shelter, the less drain upon the national resources. We cannot be entirely sure whether the regulations forbad all construction except of houses for "war-workers," and

‡ §1075.7(f).

‡‡ §2(a)(2) of §633, Title 50, War Appendix, U. S. C.

for this reason we shall assume that "priority" materials might be allotted to other houses. Even so, the limits imposed were such as "to promote the national defense"; for they made it certain that any building, even though not directly connected with the production of munitions, should be cheap; and that *pro tanto* limited the drain upon the total stock of available materials.

A more difficult question is whether the regulations were valid, if applied to houses built with materials procured under "priorities," obtained before February 10, 1943. It is true that this arises only in case we accept as part of the record the statement of the company's president which we quoted above; but, the prosecution made no objection to its consideration at the time, and we shall take it in amplification of the allegations of the information. Even then the situation does not become entirely clear. It is true that we must suppose that all five houses were actually under way before February 10, 1943, and that the company used some "priority" materials thereafter to complete them; but we do not know how close they were to completion, and it would be hard to find any practical difference between a completed house and one needing, for example, only a little more painting. We should not care to go on such a distinction, and we shall treat the case as though all the houses had been completed, on February 10, 1943. That the prohibition then added was not *ex post facto* legislation in the constitutional sense, follows from the fact that it applied only to sales made after its enactment, and that builders remained free to sell at the price to

which they had originally agreed. Therefore, the only possible challenge to the validity of the regulations is that they deprived the builders of their liberty—or conceivably their property—by adding a criminal sanction to the enforcement of their promises. It would have been valid for Congress to set a limit, enforced by criminal sanctions, upon the price at which the houses could have been sold, even though the builders had not been obliged to obtain a "priority" in order to secure the materials that went into them. That would indeed have been true price-fixing, but it would have been valid, even if applied to houses already in existence, provided the owners were granted a fair opportunity to prove what was a fair price.§ The Second War Powers Act and the regulations now before us do not provide such an opportunity except in so far as they secure to builders a "fair market price"; but no such opportunity and no determination of what is a "fair market price" were necessary when the builder fixed his own selling price in his application. He was under no compulsion to build at all; but, if he did, if he sought "priority" materials, and if he chose to take the risk that the price he fixed might not be large enough, certainly he could have no complaint that he was held to it. We need not consider what would be the result of an attempt to punish him for selling at the price he had fixed, if that was greater than the $6000 limit, or a "fair market price." In all the counts the sale price was above the price fixed in the application; and there can be no doubt that in any event the regula-

§ *Yakus* v. *United States*, 321 U. S. 414.

tions were *pro tanto* valid, if authorized by the Act, as we have held they were.

The company also raises the added point that the allegations in the information were too vague to be valid; but a mere glance at the "Forms" permitted by the Criminal Rules is answer enough. Moreover, this being an information, it could have been amended at any time, had the company felt any genuine need of further enlightenment. Rules 7(e) and 7(f).

Judgment affirmed.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. 779.**

ELADE REALTY CORPORATION,
*Petitioner,*

—against—

UNITED STATES OF AMERICA,
*Respondent.*

## PETITIONER'S REPLY BRIEF.

LOUIS L. TETELMAN,
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1450 Broadway,
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THE COURT PRESS, N. Y. C.

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. 779.**

ELADE REALTY CORPORATION,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S REPLY BRIEF.

By its brief in opposition, respondent has not gainsaid the substantial importance of the questions presented (pet. 4 and 5, resp. brief 2) which were considered difficult by the Circuit Court of Appeals.

Nor has respondent's argument been addressed to the basic points urged by petitioner.

### Referring to Petitioner's Point I.

On page 9, under paragraph 2, of respondent's brief, it is stated:

> "In other words, petitioner argues that, although it was always unlawful to sell at a higher price than that fixed in the application, and although, long before petitioner sold its houses, it was informed that such an unlawful sale would constitute a crime, nevertheless it should still be considered immune from criminal prosecution."

Petitioner presented no such argument.

Since this proceeding deals with a criminal appeal, it is assumed that the word "unlawful", as used by the respondent, connotes a criminal sanction upon violation of a regulation. But, as respondent recognizes, no law, regulation or order existed until after priority was granted and the houses erected which made it a crime for the builder to sell above the price stated in his application. Sale of a house at a price fixed by petitioner was not one of the conditions imposed by Preference Rating Order P-55 in effect before February 10, 1943 (Sec. 955.4, (h) Violations; Pet. brief p. 44), nor was petitioner affected by the Preference Rating Order P-55 in effect after February 10, 1943, which provided:

> "1) Effect on Outstanding Orders. This order shall not affect serially numbered P-55 orders issued prior to February 10, 1943." (Pet. brief App. C, p. 48)

Furthermore, the subsequent imposition of a criminal penalty constituted a new condition which neither petitioner nor the Government envisioned at the time of the filing of the application, the issuance of a priority and the completion of the houses.

Clearly, petitioner's property is taken without due process when petitioner is deterred from selling the same (at any price) for fear of the imposition of a criminal penalty arising out of a regulation promulgated after he had made his bargain. It is submitted, such subsequent regulation cannot apply to petitioner.

**Referring to Petitioner's Point II.**

In an attempted refutation of petitioner's argument that no reasonable relationship exists between a re-

striction on the sales price of the house to the public at large and the purposes intended and objects sought under the Second War Act, respondent asserts (Res. brief 7):

> "* * * if scarce materials were to be used only for inexpensive houses, it necessarily followed that less materials would be used per house, and thus more houses built with the materials available."

But the regulation covers that situation directly. Preference Rating Order P-55, section 955.4 (d) provides:

> "Restrictions on use of preference rating—(1) Restrictions on the builder:
>
> (i) The Builder may apply the preference rating hereby assigned only to those *quantities* and *kinds* of Defense Housing Material specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder." (Pet. brief, Appendix B, p. 41.) (Italics supplied.)

Obviously, it was wholly unnecessary to adopt a remote, indirect and inefficacious device of restricting the sales price to get the most out of limited materials.

Respondent further argues that even though the houses concededly could be sold to the public at large, "* * * it was nevertheless necessary, in order to make housing available to defense workers, that the houses on the market be within the financial reach of such workers * * *" (Res. brief 8). But the builder had "agreed to give either exclusive or preferential occupancy to defense workers at the maximum rental"

(Res. brief 3) and the houses actually had been rented to war workers (R. 31) who occupied them to be near the defense plant vicinity in order to produce war materials; and that occupancy was protected by the rent regulations for housing of the Office of Price Administration (8 F. R. 13814, Sec. 4 (f)). The war worker's status was temporary, but his occupancy was nevertheless permanently protected. Sales did not take place until a year and a half after completion and renting to war workers. An outside purchaser took subject to and could not impair that occupancy or the maximum rental required to be paid. Furthermore, encumbered by war worker occupancy and possession, the price of the house was adversely affected and necessarily remained within the financial reach of the war worker if he desired permanent occupancy through fee ownership.

## CONCLUSION.

**It is respectfully submitted that the petition should be granted.**

Respectfully submitted,

LOUIS L. TETELMAN,
*Attorney for Petitioner.*

New York, N. Y.,
January 15, 1947.

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 11 |
| Appendix | 12 |


## CITATIONS


| | |
|---|---|
| **Cases:** | |
| *Gallagher's Steak House, Inc.* v. *Bowles*, 142 F. 2d 530, certiorari denied, 322 U. S. 764 | 7 |
| *Glasser* v. *United States*, 315 U. S. 60 | 11 |
| *Hagner* v. *United States*, 285 U. S. 427 | 11 |
| *L. P. Steuart and Bro., Inc.* v. *Bowles*, 322 U. S. 398 | 7 |
| *Shreveport Engraving Co.* v. *United States*, 143 F. 2d 222, certiorari denied, 323 U. S. 749 | 7 |
| *Varney* v. *Warehime*, 147 F. 2d 238, certiorari denied, 325 U. S. 882 | 7 |
| **Statutes:** | |
| Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176), 50 U. S. C. App., Supp. V, 633, et seq.): | |
| Sec. 2 (a) (2) | 12 |
| Sec. 2 (a) (5) | 12 |
| Sec. 2 (a) (8) | 12 |
| First War Powers Act, December 22, 1941 (55 Stat. 838) | 17 |
| **Miscellaneous:** | |
| Conservation Order L–41 (7 Fed. Reg. 2730) | 3, 13 |
| Executive Order #8629 dated January 7, 1941 (6 Fed. Reg. 191) | 13 |
| Executive Order #9024 dated January 16, 1942 (7 Fed Reg. 329) | 13 |
| Executive Order #9040 dated January 24, 1942 (7 Fed. Reg. 527) | 13 |
| Executive Order #9070 issued February 24, 1942 (7 Fed. Reg. 1529) | 17 |
| Executive Order #9125 dated April 7, 1942 (7 Fed. Reg. 2719–2720) | 13 |


726302—47——1

Miscellaneous—Continued Page

General Preference Order P–55–b issued March 27, 1943 (8 Fed. Reg. 3828), amended April 9, 1943 (8 Fed. Reg. 4705), and August 23, 1943 (8 Fed. Reg. 11664) ..... 16

Limited Preference Order P–55–c issued February 12, 1944 (9 Fed. Reg. 1696), amended April 1, 1944 (9 Fed. Reg. 3564), and February 5, 1945 (10 Fed. Reg. 1483) ..... 16

National Housing Agency General Orders:

No. 60–2 (8 Fed. Reg. 1829) ..... 4, 17

No. 60–2A (9 Fed. Reg. 3065) ..... 17

No. 60–2B (9 Fed. Reg. 245) ..... 17

No. 60–2C (9 Fed. Reg. 2816) ..... 17

No. 60–3 (8 Fed. Reg. 1830) ..... 4, 17

No. 60–3A (8 Fed. Reg. 12079) ..... 18

No. 60–3B (8 Fed. Reg. 12080) ..... 18

No. 60–3C (9 Fed. Reg. 247) ..... 18

Preference Rating Order P–55 (6 Fed. Reg. 4842), amended March 2, 1942 (7 Fed. Reg. 1636), April 20, 1942 (7 Fed. Reg. 2940) and February 12, 1943 (8 Fed. Reg. 1951) .. 3

Section 955.4 (2) (b), (d) (1) (i) and (h) ..... 13–14

Section 1075.7 (f), (i) ..... 15

Preference Rating Order P–55a (c), issued February 20, 1943 (8 Fed. Reg. 2260) ..... 4, 16

U. S. Government Manual issued by Division of Public Inquiries, Office of War Information, 1945 ..... 8

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 779

ELADE REALTY CORPORATION, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the circuit court of appeals (R. 48–52) has not yet been reported. The opinion of the district court denying a motion to dismiss the information appears at pages 15–23 of the record.

### JURISDICTION

The judgment of the circuit court of appeals was entered November 12, 1946 (R. 52). The petition for a writ of certiorari was filed December 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

## QUESTIONS PRESENTED

1. Whether, in the exercise of the power to allocate scarce building materials in the interest of national defense, it was proper to exact the condition that housing units to which materials were allocated be sold at a maximum price fixed by the builder.

2. Whether the fact that non-compliance with such condition was not a crime when the allocations were made precluded the administrative agencies exercising the function of allocation from thereafter ordering compliance as to future sales and thus making failure to comply a crime under the Second War Powers Act.

3. Whether the information was sufficiently definite and certain to state an offense.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations appear in the Appendix, *infra.* pp. 12–18.

## STATEMENT

The Second War Powers Act conferred upon the President the power, whenever he was satisfied that fulfillment of requirements for defense

would result in a shortage of materials, to allocate materials and supplies in such manner and upon such conditions as he should deem necessary or appropriate in the public interest and to promote the national defense (Appendix, *infra*, p. 12). Pursuant to authority delegated to it by the President, the War Production Board on April 9, 1942, issued Conservation Order L–41 (7 Fed. Reg. 2730) substantially forbidding all new construction without authorization. The order exempted construction given priorities assistance by the issuance of preference ratings for certain specified kinds of construction, including a P–55 rating in respect of privately financed defense housing. Such rating had originally been established by order of the Office of Production Management on September 22, 1941 (6 Fed. Reg. 4842), for defense housing projects. (See Appendix, *infra*, pp. 13–14.) The rating was issued on the basis of an application by the builder, referred to in the order as Form PD–105, in which the builder set forth the nature of his anticipated project, agreed to give either exclusive or preferential occupancy to defense workers at the maximum rental, and agreed not to sell the unit above a price which he fixed in the application. On February 12, 1943, Preference Rating Order P–55 was amended to include a provision ordering persons who obtained priority

assistance to comply with the representations in the application (8 Fed. Reg. 1951).

On February 20, 1943, Preference Rating Order P–55a was issued by the War Production Board prohibiting sales of houses previously given priorities assistance under P–55 at prices other than those fixed in the application, "except as authorized by regulations or orders of the National Housing Agency" (8 Fed. Reg. 2260; Appendix, *infra,* p. 16).

The National Housing Agency, which was given responsibility for securing the proper occupancy of housing for war workers, on February 9, 1943, issued its General Orders Nos. 60–2 and 60–3 (8 Fed. Reg. 1829, 1830, Appendix, *infra,* pp. 17–18), covering private war housing, including housing for which priority assistance had been obtained prior to February 10, 1943. These orders provided that such housing should be rented, sold, or transferred only in accordance with the provisions of the application for priority assistance, unless a different disposition had theretofore been authorized by the War Production Board or should thereafter be authorized by the National Housing Agency. These provisions against resale on conditions other than those stated in the application for priorities, unless some different disposition was authorized, were continued in subsequent amendments and reissues of these

regulations until October 15, 1945, when they were revoked (Appendix, *infra*, pp. 17–18).

An information in 28 counts was filed against petitioner and its president in the United States District Court for the Eastern District of New York, each count charging that on a specified date between March and August of 1945, the defendants sold a specified housing unit at a certain price in excess of $5,000, "even though the construction of such unit had been made possible by priorities assistance which was granted upon the condition and agreement that such unit would be sold at a price not in excess of $4,990" (R. 6–11).

The defendants moved to dismiss the information on the ground that it did not state facts sufficient to constitute a crime and on the further ground that, in so far as the regulations on which the information was based purported to render criminal the acts charged therein, they violated the Fifth Amendment to the Constitution (R. 12–14). The district court denied the motion to dismiss (R. 24) in an opinion in which it upheld the validity of the information and the regulations on which it was based (R. 15–23).

Thereafter, petitioner pleaded guilty to five counts of the information and moved in arrest of judgment on the ground that the information failed to state an offense (R. 25). That motion was denied (R. 28). Petitioner was fined $3,500

on each of these counts, or a total of $17,500 (R. 35). The other counts were dismissed as to petitioner and all counts were dismissed as to its president (R. 35). Petitioner again moved in arrest of judgment and its motion was again denied (R. 35–36).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of the district court was affirmed (R. 52). In determining the validity of the regulations as applied to petitioner, the circuit court of appeals accepted, as amplifying the allegations of the information, a statement by petitioner's president at the time of sentence that the houses involved in the information had been substantially completed by February 10, 1943 (R. 49, 50; see R. 31).

## ARGUMENT

1. Petitioner contends (Pet. 7, 18–31) that the authority to allocate scarce materials conferred by the Second War Powers Act did not include authority to fix resale prices as a condition to the granting of such priorities, and hence that the War Production Board and the National Housing Agency were without power to issue regulations prohibiting sales at prices higher than those fixed in the application for priorities. However, as both courts below pointed out (R. 20, 50), although the act under which these regulations were issued did not authorize general price fixing as such, it does not follow that the agencies

charged with the duty of allocation could not adopt any measure calculated to carry out the purposes of that act, including price fixing, if such a device reasonably tended to further these purposes. The courts have held, in relation to other aspects of the allocation power, that the administrative agency charged with its execution could properly adopt measures reasonably designed to carry out the purposes of the act. *L. P. Steuart and Bro., Inc.* v. *Bowles,* 322 U. S. 398; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222, 224 (C. C. A. 5), certiorari denied, 323 U. S. 749; *Gallagher's Steak House, Inc.* v. *Bowles,* 142 F. 2d 530, 534 (C. C. A. 2), certiorari denied, 322 U. S. 764; *Varney* v. *Warehime,* 147 F. 2d 238, 244–245 (C. C. A. 6), certiorari denied, 325 U. S. 882.

The allocation of scarce building materials only to housing which was to be resold at a low cost had a direct tendency to further the public interest and to promote national defense. In the first place, as the court below said (R. 50), if scarce materials were to be used only for inexpensive houses, it necessarily followed that less materials would be used per house and thus more houses built with the materials available. Furthermore, the requirement that prices be kept low would also have the result of making the houses available to the group for which they were primarily intended, the workers in defense industries. Building priorities for private housing were granted

726302—47——2

only in areas where there were substantial groups of defense workers. (See United States Government Manual issued by the Division of Public Inquiries, Office of War Information, 1945, p. 129, quoted at Pet. 19.) To accomplish the purpose of making housing available for these groups, it was necessary that the houses to be built be sold at prices which defense workers could pay. Even assuming, as petitioner argues, that sales were not absolutely limited to defense workers alone, it was nevertheless necessary, in order to make housing available to defense workers, that the houses on the market be within the financial reach of such workers. Hence, the limitation of prices in this particular field as a condition to the allocation of materials for building had a direct tendency effectively to implement allocation of materials for the national defense, and thus to further the specific objectives of the Second War Powers Act.

If it was proper to annex to the allocation of materials a condition that the houses be sold only at maximum prices fixed by the builder, then it was clearly proper to order the builder to maintain the prices which he himself had fixed. The fact that, as petitioner argues (Pet. 29–30), other means of enforcement might have been used, certainly did not preclude the administrative agencies from ordering compliance with a condition which, as we have shown, they had a right to impose. And since violation of such an order was specifically made a crime under the Second War Powers

Act, it was, of course, proper to use criminal sanctions against such violation.

2. Petitioner argues, however (Pet. 6–7, 14–17), that since, at the time it obtained its priority and built its houses,[1] a failure to observe the terms of its agreement with the Government did not constitute a crime, its acts in later selling the houses at excessive prices could not have been criminal, even though the order forbidding sales at prices above those fixed in the application was issued two years before petitioner sold its houses. In other words, petitioner argues that, although it was always unlawful to sell at a higher price than that fixed in the application, and although, long before petitioner sold its houses, it was informed that such an unlawful sale would constitute a crime, nevertheless it should still be considered immune from criminal prosecution.

The mere statement of the argument, we submit, negates its validity. The regulations of February 10, 1943, clearly were not *ex post facto* as to the sales charged in this information, which took place more than two years after those regulations went into effect. Every new criminal statute necessarily makes criminal a type of act which was not a crime before the statute was passed.

[1] We assume, as did the court below (R. 50), that petitioner's houses were completed before February 10, 1943, when the regulations for the first time prohibited sales at prices above those fixed in the applications for priorities It should be noted, however, that this assumption is based on the statement that the construction was performed between March, 1942 and July, 1943 (R. 31).

Nor is there any merit in petitioner's argument that the regulation of February 10, 1943, as applied to it, violated the due process clause of the Fifth Amendment. The regulation merely ordered petitioner to comply with an agreement which it had itself voluntarily made in order to obtain materials which it could not otherwise have obtained. After having obtained the materials and received a benefit from the Government, petitioner is in no position to complain because it is being held to its bargain. Furthermore, it should be noted that the record shows that after February 10, 1943, petitioner applied under National Housing Agency regulations and obtained from that agency permission to sell its houses at a price somewhat higher than the price for which it agreed to sell them in its priority application (R. 30–31). The fact that petitioner did not receive permission to sell at a still higher price certainly did not give it authority to take the law into its own hands.

3. Petitioner also challenges the sufficiency of the information as a pleading (Pet. 7–8, 31–35) on the ground that it is too vague and indefinite to state an offense. The attack is predicated largely on the absence of allegations specifically identifying the priority application filed by petitioner.

Since, however, the offenses here charged were sales at a price above that set forth in the priority application and attending documents, the significant fact is the price fixed by petitioner. That

fact is specifically set forth in the information. In addition, the information identifies the houses sold, the dates of sale, the names of the purchasers, and the sale prices. If petitioner had any difficulty in identifying the priority application referred to, it could have obtained such information by a bill of particulars. Moreover, the statement of petitioner's president at the time of sentence after its plea of guilty (R. 28–35) makes it clear that petitioner was fully informed of the charge against it and had ample opportunity to prepare its defense had it desired to contest its guilt. The information was thus sufficient to meet the test by which its validity must be judged; it informed petitioner of the nature of the offenses and barred future prosecution on the same charges. *Glasser* v. *United States*, 315 U. S. 60, 66; *Hagner* v. *United States*, 285 U. S. 427, 431.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1947.

## APPENDIX

### STATUTES AND REGULATIONS INVOLVED

The Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176), 50 U. S. C. App., Supp. V, 633), provides in part:

> SEC. 2 (a) (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *
>
> (8) The President may exercise any power, authority, or discretion conferred on

him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

By Executive Order No. 8629, dated January 7, 1941 (6 Fed. Reg. 191), the President conferred his power under Section 2 (a) of the Act of June 28, 1940, on the Office of Production Management, and thereafter by Executive Orders Nos. 9024, dated January 16, 1942 (7 Fed. Reg. 329), 9040, dated January 24, 1942 (7 Fed. Reg. 527), and 9125, dated April 7, 1942 (7 Fed. Reg. 2719–2720), the President conferred his power under Section 2 (a) of the Second War Powers Act on the War Production Board.

Pursuant to the authority delegated to it, the War Production Board on April 9, 1942, issued Conservation Order L–41 (7 Fed. Reg. 2730), which provided that no new construction be commenced without authorization from the War Production Board, subject to certain exceptions. As to housing, only $20C of new construction a year was permitted without authorization.

Preference Rating Order P–55 was issued September 22, 1941 (6 Fed. Reg. 4842), amended March 2, 1942 (7 Fed. Reg. 1636), and April 20, 1942 (7 Fed. Reg. 2940), providing for allocation of scarce building materials to defense housing projects on the basis of an application form filed by the builder. In pertinent part it provided as follows:

> SEC. 955.4 *Preference rating order P–55.* For the purpose of facilitating the acquisition of Material for the construction of

the Defense Housing Project hereinafter described, a preference rating is hereby assigned to deliveries to the above-named Builder and to deliveries to his Subcontractors and Suppliers upon the following terms:

* * * * *

(2) "Defense housing project" means the housing project described in the Builder's Application on Form PD–105, No. ------, dated ----------, comprising ------ units, as finally approved (hereinafter referred to as the "Application").

* * * * *

(b) *Assignment of preference rating.* Preference Rating ------ is hereby assigned (1) to deliveries to the Builder of those quantities and kinds of Defense Housing Material which may be specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder.

* * * * *

(d) *Restrictions on use of preference rating*—(1) *Restrictions on the builder:*

(i) The Builder may apply the preference rating hereby assigned only to those quantities and kinds of Defense Housing Material specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder. This Order will be cancelled immediately if the Builder is found to have applied the rating to deliveries in excess of his specific authorization.

* * * * *

(h) *Violations.* Any Person who willfully violates any provisions of this Order

or who by any act or omission falsifies records to be kept or information to be furnished pursuant to this Order may be prohibited from receiving further delivery of any Material subject to allocation, and such further action may be taken as is deemed appropriate including a recommendation for prosecution under Section 35A of the Criminal Code (18 U. S. C. 80).

On February 12, 1943, Preference Rating Order P-55 was again amended (8 Fed. Reg. 1951), to include, *inter alia,* the following:

SEC. 1075.7 (f) *Liability of owner.* The owner and any other person who now holds or hereafter acquires any beneficial interest in the housing project or any part thereof, is hereby ordered to comply with all the representations, certifications and promises made by said owner in the Application, except where and to the extent such other person is relieved of such responsibility by regulation of the National Housing Agency.

* * * * *

(i) *Violations.* Any person who willfully violates any provision of this order, or who, in connection with this order, willfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime and, upon conviction, may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of or from processing or using material under priority control, and may be deprived of priorities assistance by the Director General for Operations, and may be denied permission to begin construction under General Conservation Order L-41.

W. P. B. Preference Rating Order P–55a was issued February 20, 1943 (8 Fed. Reg. 2260), and established conditions relating to the rentals and sales prices applicable to the holding and disposition of war housing units. It contained the following clause:

> (c) *Conditions applicable to owners of war housing.* No person to whom a Preference Rating Order P–55 has been assigned shall transfer or dispose of any dwelling unit to which such order relates, or accept payment of rental or sales price for any such unit except in the manner and for the amount set forth in the application form or in the manner and for the amount approved pursuant to paragraph (a) hereof; nor shall any such person so transfer or dispose of any such unit to any person other than the persons specified in paragraph (b) hereof, except as authorized by regulations or orders of the National Housing Agency.

General Preference Order P–55–b was issued March 27, 1943 (8 Fed. Reg. 3826), and was amended on April 9, 1943 (8 Fed. Reg. 4705), and August 23, 1943 (8 Fed. Reg. 11664). It established a somewhat different system of control. The liability clause was contained in the original Order and all amendments thereto.

The system was again altered somewhat by Limited Preference Order P–55–c issued February 12, 1944, effective March 1, 1944 (9 Fed. Reg. 1696), and amended on April 1, 1944 (9 Fed. Reg. 3564), and February 5, 1945 (10 Fed. Reg. 1483). It provided for the granting of authorization for housing construction and the use of priorities

assistance in acquiring material for such construction, and further provided that the applicant and any other person who held or acquired any interest in the project must abide by all representations, certifications and promises made by him in the application. The liability clause was contained in the original Order and all amendments thereto.

By Executive Order 9070, issued February 24, 1942 (7 Fed. Reg. 1529), under the First War Powers Act of December 22, 1941 (55 Stat. 838), the National Housing Agency was given responsibility for assuring proper occupancy of housing projects for war workers. On February 9, 1943, it issued National Housing Agency General Orders 60–2 and 60–3 (8 Fed. Reg. 1829, 1830), covering private war housing, including housing for which priority assistance had been received under Preference Rating Order P–55, prior to February 10, 1943.

National Housing Agency General Order No. 60–2, § 702.4 (b), provided:

> Private war housing begun prior to February 10, 1943, shall be rented, sold, or transferred only in accordance with the provisions of the application (or other instruments related thereto) for priority assistance, authority to begin construction * * *.

This order was reissued with revisions as General Order 60–2A (9 Fed. Reg. 3065), 60–2B (9 Fed. Reg. 245), and Regulation Order No. 60–2C (9 Fed. Reg. 2816).

National Housing Agency General Order No. 60–3 provided:

> § 702.11 (c) All private war housing begun prior to February 10, 1943, which has not

been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner except that for the duration of the national emergency declared by the President on September 8, 1939:

(1) Rentals or sales prices (except for involuntary transfer and except to the extent approved prior to February 10, 1943, by the War Production Board, or subsequent to February 10, 1943, by the National Housing Agency) shall not exceed the respective maximum amounts permitted by the conditions of the application (or other instruments related thereto) for priority assistance * * *.

§ 702.12. The initial rent charge prior to any occupancy or the sale price for any housing accommodations in a private war housing project may be increased over the amount provided therefor in § 702.11 only when approved by the National Housing Agency. * * * Each National Housing Agency Regional Representative is hereby authorized to grant such relief as he deems appropriate in the particular case, provided the petition for relief shows clearly that the owner has incurred, or will incur, costs in the construction of such housing, over which the owner had or has no control, in excess of the costs estimated originally in connection with such housing.

General Order No. 60–3 was issued with revisions as General Order No. 60–3A (8 Fed. Reg. 12079), General Orders No. 60–3B (8 Fed. Reg. 12080), and No. 60–3C (9 Fed. Reg. 247).

The restrictions on the sale of houses built with priority assistance were continued in all amendments and reissues of these orders.

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